

Appeal from a decision of the Boise, Idaho, District Office, Bureau of Land Management, rejecting desert land entry application I-9084.

Affirmed.

1. Applications and Entries: Valid Existing Rights -- Desert Land Entry: Applications -- Desert Land Entry: Lands Subject to -- Withdrawals and Reservations: Effect of

In the absence of favorable action upon a petition to designate the land as suitable for desert land entry, an application for a desert land entry will not be considered a valid existing right excepted from a subsequent withdrawal order, and the application must be rejected by BLM, regardless of any challenge to the propriety and efficacy of the subsequent withdrawal.

APPEARANCES: Richard S. Gregory, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Richard S. Gregory has appealed from a decision of the Boise, Idaho, District Office, Bureau of Land Management (BLM), dated September 27, 1985, rejecting desert land entry application I-9084.

On December 6, 1974, appellant filed a desert land entry application for 320 acres of land situated in the E 1/2 sec. 18, T. 4 S., R. 4 E., Boise Meridian, Elmore County, Idaho, pursuant to section 1 of the Act of March 3, 1877, as amended, 43 U.S.C. § 321 (1982), and 43 CFR Part 2520. Appellant proposed to grow 304 acres of alfalfa with water from a well and to harvest and sell the alfalfa at a profit. The application was accompanied by a "Petition for Classification," requesting classification of the land as suitable for desert land entry.

The petition for classification was made necessary by Executive Order (EO) No. 6910, dated November 26, 1934, withdrawing the land from entry under the nonmineral public land laws. See 43 U.S.C. § 315f (1982); 43 CFR 2400.0-3(a). In its September 1985 decision, BLM rejected appellant's

application pursuant to 43 CFR 2091.1 because the land had been withdrawn from entry under the "Desert Land" Act by Public Land Order (PLO) No. 5777 "[i]n November 1980," for the "Snake River Birds of Prey Area."

In PLO No. 5777, the Secretary of the Interior withdrew, subject to valid existing rights, approximately 417,775 acres of land, including the land sought by appellant, "from entry, application, or selection under the Desert Land Act (43 U.S.C. 351 et seq.)" as part of the Snake River Birds of Prey National Conservation Area. 45 FR 78688 (Nov. 26, 1980). This 20-year withdrawal was undertaken pursuant to section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714 (1982), and had an effective date of November 26, 1980.

In his statement of reasons for appeal, appellant contends the BLM rejection of his desert land entry application was improper because it abridged an "existing lawful right" without due process of law. Appellant also challenges the November 1980 withdrawal as being arbitrary, "with little or no physical inspection or consideration of other factors," and "actually detrimental to birds of prey," when compared to multiple-use management.

[1] It is well established that BLM properly rejects a desert land entry application if the land described in the application has previously been withdrawn from desert land entry. E.g., Gary E. Carter, 65 IBLA 338 (1982) (PLO No. 5777); William F. Ringert, 12 IBLA 378 (1973); Ralph J. Mellin, 6 IBLA 193 (1972). Only "unreserved" public land is subject to desert land entry. 43 CFR 2520.0-8(a). Moreover, BLM must reject an application and cannot hold it pending possible future availability of the land "when approval of the application is prevented by * * * [w]ithdrawal or reservation of [the land]." 43 CFR 2091.1; see Robert A. Adams, 57 IBLA 370 (1981); Edith O. Fisher, 17 IBLA 258 (1974); see also Vaughn K. Leavitt, 55 IBLA 59 (1981).

The question presented by appellant in this appeal is whether BLM may reject appellant's desert land entry application which was filed prior to withdrawal of the land. appellant's application cannot be rejected if it constitutes a "valid existing right" specifically excepted from the effect of the withdrawal in PLO No. 5777. 45 FR 78688 (Nov. 26, 1980).

Valid existing rights are considered to be "property interests" which are "immune from denial or extinguishment by the exercise of secretarial discretion." The Bureau of Land Management Wilderness Review and Valid Existing Rights, Solicitor's Opinion, 88 I.D. 909, 911, 912 (1981); see also State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984). It has long been recognized that by merely filing a desert land entry application an applicant creates "no present right or interest in the land." Ralph G. Faulkner, 26 IBLA 110, 113 (1976), aff'd, Faulkner v. Watt, Civ. No. 1-77-99 (D. Idaho Nov. 16, 1979), aff'd, 661 F.2d 809 (9th Cir. 1981). This being the case, an application is not immune from denial or extinguishment by the exercise of secretarial discretion. Frances M. Williams, A-28034 (Aug. 20, 1959). The logic of this finding becomes apparent when one recognizes that approval of a desert land entry

application is vitally dependent on the exercise of the Secretary's discretionary authority to classify the land sought as suitable for desert land entry, pursuant to section 7 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315f (1982), and 43 CFR Part 2450. See 43 CFR 2400.0-3(a); William F. Ringert, supra. In appellant's "Petition for Classification" (Form 2400-7 (October 1971)), appellant "requests the Secretary of the Interior to take an action that is entirely within his discretion." The Secretary had not exercised his discretionary authority to classify the land as suitable for desert land entry at the time of the 1980 withdrawal, and appellant's application was not excepted from the effect of the withdrawal. 1/ See Frances M. Williams, supra; Fern Hill Hunter, A-27756 (Jan. 13, 1959). Following the withdrawal, BLM was obligated to reject appellant's application. 2/ Id.

The rejection of appellant's application abridged no existing lawful right of appellant. The only right acquired by filing a desert land entry application is the right to have the application considered. Ralph G. Faulkner, supra. Moreover, appellant suffered no denial of due process. Due process does not require a hearing in all cases of an alleged impairment of property rights, and is met if the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies that requirement. Santa Fe Pacific Railroad Co., 90 IBLA 200 (1986).

Finally, appellant challenges the propriety and efficacy of the withdrawal in PLO No. 5777. However, these questions are not subject to adjudication by the Board. Gary E. Carter, supra; Juanice H. McCain, 4 IBLA 188 (1971), appeal dismissed, McCain v. Secretary of the Interior, Civ. No. 72-117-N (S.D. Cal. Apr. 28, 1974). As we said in Gary E. Carter, supra at 339: "The withdrawal operates as an absolute bar to appropriation of the land under the desert land laws until the withdrawal is revoked and the land restored to entry. Cecilia J. Cuin, 36 IBLA 250 (1978)." See also Robert A. Adams, supra at 372.

1/ We distinguish those desert land entry cases in which there has been a classification of the land as suitable for desert land entry pursuant to section 7 of the Taylor Grazing Act and thus are considered to afford the applicants preference rights. See 43 U.S.C. @ 315f (1982); 43 CFR 2450.8. These entries would be excepted from a subsequent withdrawal so long as they subsist. C. Arden Gingery, 2 IBLA 351, 362 (1971), and cases cited therein; see also Vivian A. Kelsey, A-29492 (July 26, 1963) (preference right arising under 43 U.S.C. @ 326 (1982) prior to EO No. 6910); George B. Willoughby, 60 I.D. 363 (1949).

2/ On appeal, appellant also states that the delay in adjudicating his application was "arbitrary and discriminatory." We cannot fully explain why it took from December 1974 (when appellant filed his application) until September 1985 for BLM to reject the application. It is quite possible the delay is attributable to the events leading up to withdrawal of the land as part of the national conservation area. Regardless of the delay, the intervening withdrawal makes rejection of appellant's application mandatory. Cf. Hrubetz Oil Co., 93 IBLA 343 (1986), and cases cited therein (land designated as within a known geologic structure).

We find appellant's application for desert land entry was not a "valid existing right," and the application was properly rejected by BLM.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge.

